MOTION FILED

OCT 16 1995

(2)

No. 95-450

In the Supreme Court of the United States

OCTOBER TERM, 1995

ORIX CREDIT ALLIANCE, INC., PETITIONER

v.

DELTA RESOURCES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR GENERAL MOTORS ACCEPTANCE CORPORATION, FORD MOTOR CREDIT COMPANY, AND CHRYSLER CREDIT CORPORATION AS AMICI CURIAE SUPPORTING PETITIONER

ROY T. ENGLERT, JR.
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0657

Counsel for Amici Curiae

21 pp

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-450

ORIX CREDIT ALLIANCE, INC., PETITIONER

v.

DELTA RESOURCES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION OF GENERAL MOTORS ACCEPTANCE CORPORATION, FORD MOTOR CREDIT COMPANY, AND CHRYSLER CREDIT CORPORATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE SUPPORTING PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, amici respectfully move for leave to file the attached brief in support of petitioner. Petitioner ORIX Credit Alliance, Inc., has consented to the filing of this brief. Counsel for respondent Delta Resources, Inc., has declined to give consent.

Amici bring to bear on this case a perspective somewhat different from that of petitioner, which may be helpful to the Court. Amici are lending subsidiaries of the three leading American motor vehicle manufacturers. Each of them extends credit, in the form of "floor plan financing" on vehicles (manufactured by the parent company or by another supplier) to dealers who sell or lease such vehicles at retail. The manufacturers themselves will not sell vehicles to dealers on credit, but some 70-80% of all vehicles sold through

dealerships are financed by "floor plan financing" provided by lending subsidiaries. Floor plan financing is a multi-billion-dollar business.

In a typical floor plan financing plan – which is common in consumer retailing of durable goods throughout the American economy, not just in the motor vehicle industry – the lender receives no repayment of principal unless and until the dealer sells the collateral (for example, a particular car); the principal is then repaid out of the proceeds of sale. In exchange for those generous terms regarding repayment of principal, the lender retains a "purchase money security interest" in each vehicle under Section 9-107 of the Uniform Commercial Code and requires the dealer to make monthly payments of interest, sometimes referred to in the industry as "floor plan charges."

The decision below holds that, although an oversecured creditor is undisputedly entitled to receive interest under Section 506 of the Bankruptcy Code, 11 U.S.C. § 506, a bankruptcy court may *not* order that such interest be paid to the creditor during the pendency of the bankruptcy case as "adequate protection" under Sections 361 and 362(d) of the Code, 11 U.S.C. §§ 361, 362(d). Instead, the creditor must await the end of the bankruptcy case to receive interest – if, in fact, there is money remaining to pay the accrued interest at the end of the case.

As applied to floor plan financing, that holding would allow a debtor in bankruptcy to cease altogether its payment of "floor plan charges" and accrue a potentially massive interest obligation to the lender while repaying only the principal of loans on motor vehicles as they are sold. Such a result is directly harmful to amici. It also would jeopardize the debtor's own prospects of successful reorganization and the debtor's ability to obtain credit during its bankruptcy case, since the lender's inability to receive *any* recompense for financing millions of dollars worth of inventory during the bankruptcy case will often force the lender to seek relief from the automatic stay in bankruptcy – even if the lender

would otherwise prefer to work *with* the debtor to preserve its going-concern value. Denying commercial lenders the ability (even when they are oversecured) to obtain any interest or financing charges at all during bankruptcy would also necessarily increase the cost of credit for commercial borrowers generally.

Amici believe that the decision below results from a misreading of this Court's decision in *United Savings Association of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988). In light of that fact, and the great practical importance of the question presented, amici will urge the Court to grant certiorari and reverse the decision below, as is more fully explained in the attached amicus brief. Amici therefore respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0657

Counsel for Amici Curiae

OCTOBER 1995

QUESTION PRESENTED

Whether an oversecured creditor, who is undisputedly entitled to postpetition interest under 11 U.S.C. § 506(b), must await the end of the bankruptcy case before receiving such interest, or may instead receive interest payments during the bankruptcy case as part of the "adequate protection" of its interest in the collateral required by 11 U.S.C. §§ 361 and 362(d)(1).

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (i)

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) . . 7
Dewsnup v. *Timm*, 502 U.S. 410 (1992) 3
In re East-West Associates, 106 B.R. 767 (S.D.N.Y. 1989) 7
In re Patterson, 825 F.2d 1140 (7th Cir. 1987) 11
Keene Corp. v. *United States*, 113 S. Ct. 2035 (1993) . 7
Lorillard v. *Pons*, 434 U.S. 575 (1978) 7
New York Life Insurance Co. v. *Revco D.S., Inc.*, 901 F.2d 1359 (6th Cir. 1990) 12
NLRB v. *Bildisco & Bildisco*, 465 U.S. 513 (1984) 10,13
Pennsylvania Department of Public Welfare v. *Davenport*, 495 U.S. 552 (1990) 12
Rake v. *Wade*, 113 S. Ct. 2187 (1993) 3
United Savings Association of Texas v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988) . . . . . *passim*
United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) 3

STATUTES

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 7

Bankruptcy Code:
Section 361, 11 U.S.C. § 361 3,4,6
Section 362(d)(1), 11 U.S.C. § 362(d)(1) . . . 1,2,4,5,6
Section 362(d)(2), 11 U.S.C. § 362(d)(2) 7
Section 363, 11 U.S.C. § 363 10
Section 506, 11 U.S.C. § 506 5,6
Section 506(b), 11 U.S.C. § 506(b) . . . . . *passim*

TABLE OF AUTHORITIES – Continued

Page

Section 552, 11 U.S.C. § 552 3,4
Section 552(b), 11 U.S.C. § 552(b) 7
Section 1129(a)(7)(A)(ii),
11 U.S.C. § 1129(a)(7)(A)(ii) 8

Uniform Commercial Code:
Section 9-203(3) 10
Section 9-306 10
Section 9-312(3) 10

MISCELLANEOUS

COLLIER ON BANKRUPTCY (15th ed. L. King 1995):
Volume 2 6,7
Volume 3 2,6

Warren, *Bankruptcy Policy*, 54 U. CHI.
L. REV. 775 (1987) 11

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-450

ORIX CREDIT ALLIANCE, INC., PETITIONER

v.

DELTA RESOURCES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF GENERAL MOTORS ACCEPTANCE CORPORATION, FORD MOTOR CREDIT COMPANY, AND CHRYSLER CREDIT CORPORATION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The interests of the amici are set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

Section 506(b) of the Bankruptcy Code entitles *over*-secured creditors to interest on their claims. By contrast, the omission of *under*secured creditors from any such entitlement in Section 506(b) led this Court to hold that undersecured creditors may not obtain such interest as "adequate protection" under a related Code provision, Section 362(d)(1). *United Savings Association of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988). The Eleventh Circuit acted inconsistently with the central rationale of

Timbers when it held that oversecured creditors are indistinguishable from undersecured creditors for purposes of Section 362(d)(1) and therefore may not obtain current interest payments as part of "adequate protection." On the contrary, as the leading bankruptcy treatise recognizes, "[e]ntitlement to current payment of such amounts [interest authorized by Section 506(b)] must be grounded * * * in the provision of adequate protection." 3 COLLIER ON BANKRUPTCY ¶ 506.05, at 506-44 (15th ed. L. King 1995).

The practical importance of the Eleventh Circuit's decision cannot be overstated. The decision would jeopardize routine and settled practice in the bankruptcy courts of allowing postpetition interest payments as "adequate protection" and in cash collateral orders designed to aid effective reorganization. In a context with which amici are particularly familiar – dealer bankruptcies in which dealer inventory has been financed by "floor plan financing" involving monthly interest charges but no repayment of principal until inventory is sold – the Eleventh Circuit's decision, by precluding current postpetition interest payments, would lead to more adamant creditor insistence on relief from the automatic stay, dimmer prospects of successful reorganization, an increase in the collateral that lenders will have to demand, and increased interest rates to cover the money lenders will lose as a result of the Eleventh Circuit's rule. Those results, inconsistent with sound bankruptcy policy, justify correction by this Court of the Eleventh Circuit's erroneous decision *before* it is allowed to sow confusion in the lower courts.

ARGUMENT

Section 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b), provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of

> such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The simple rule stated by Section 506(b), and acknowledged by the court of appeals (Pet. App. A10-A11), is that *over*secured creditors – those who hold security interests in collateral with greater value than the debt the collateral secures – are entitled to postpetition interest payments out of the so-called "equity cushion" or "security cushion." The question this case presents is whether the oversecured creditor must wait until the end of the bankruptcy case to obtain any of the interest payments to which it is entitled, despite Bankruptcy Code provisions guaranteeing the creditor "adequate protection" of its interests during the pendency of the case.

This Court has had frequent occasion in recent years to construe Section 506(b) and related sections of the Code. In several cases, the Court has strongly affirmed the right of *over*secured creditors to receive postpetition interest under Section 506(b).[1] By contrast, when *under*secured creditors claimed entitlement to interest in the form of periodic "adequate protection" payments under Section 361 of the Code, 11 U.S.C. § 361, this Court rejected that approach precisely because it is only *over*secured creditors who, by virtue of Section 506(b), have an entitlement to interest:

> It is true that § 506(b) gives the *over*secured creditor, despite lack of compliance with the conditions of § 552, a similar priority over unsecured creditors; but that does

---

[1] *Rake* v. *Wade*, 113 S. Ct. 2187, 2190 & n.4 (1993); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("Recovery of oversecured interest is unqualified."); cf. *Dewsnup* v. *Timm*, 502 U.S. 410, 417 (1992) ("Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the [oversecured] creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.").

> not compromise the principle of § 552, since **the interest payments come only out of the "cushion"** in which the oversecured creditor *does have* a perfected security interest.

United Savings Association of Texas v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 374 (1988) (italics in original; boldface emphasis added).

Notwithstanding this Court's expectation in *Timbers* that interest *payments* would come out of an oversecured creditor's equity cushion, and its emphasis that the superior rights of *over*secured creditors were what rendered inappropriate *under*secured creditors' demands for interest payments as part of "adequate protection," the court below reached the indefensible conclusion that *Timbers* "applies equally well to an oversecured creditor." Pet. App. A16. According to the Eleventh Circuit, this Court in *Timbers* did *not* hold that "adequate protection" payments will differ between oversecured and undersecured creditors; rather, it held that the "adequate protection" guaranteed by Section 362(d)(1)[2] simply *never* includes interest payments. That unprecedented holding seriously misreads *Timbers*, conflicts with accepted

---

[2] Section 362(d)(1), 11 U.S.C. § 362(d)(1), guarantees adequate protection to any creditor as a condition of not lifting the automatic stay as to that creditor and allowing that creditor to foreclose on its security interest in property under nonbankruptcy law. It states:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

"Adequate protection" is further explained in Section 361, which provides for several methods of adequately protecting the creditor's "interest in property," including "periodic cash payments."

bankruptcy practice (as reflected in the leading bankruptcy treatise), and could work profound and deleterious alterations in the day-to-day practice of bankruptcy courts.

In *Timbers*, this Court emphasized the "holistic" nature of statutory construction and in particular emphasized the interrelation of Section 362(d)(1) with "other provisions, and the substantive dispositions that they effect." 484 U.S. at 371. By far the most important other provision was Section 506, and by far its most important "substantive disposition" was the *distinction* it drew between undersecured and oversecured creditors:

> Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims—just as it denies *over*secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that "*[t]o the extent that* an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim." (Emphasis added.) Since this provision permits postpetition interest to be paid only out of the "security cushion," the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest.

484 U.S. at 372-373. If Section 506's substantive effect drove the construction of Section 362(d)(1) in *Timbers*, so too must it drive the construction of Section 362(d)(1) in this case – but to the opposite conclusion, since this case involves oversecured creditors who *are* entitled to interest under Section 506, not undersecured creditors who are not.

The Eleventh Circuit thought that the right to *current* rather than postponed interest payments, if it exists, should have been set forth in Section 506(b). Pet. App. A16. That

reasoning, however, misunderstands not only *Timbers* but also the fundamental structure of the Code. Section 506(b) is concerned with substantive rights, not timing of payments. On the other hand, Sections 361 and 362(d)(1) – especially as construed in *Timbers* – *are* concerned with the timing of payments, specifically with ensuring that a creditor either receives "adequate protection" *during* the bankruptcy case or else receives relief from the automatic stay. Thus, as the leading bankruptcy treatise points out:

> It is important to recognize that section 506(b) provides only for the *allowance* of postpetition interest * * * as part of a secured claim. It does not require the current *payment* of such amounts. **Entitlement to current payment of such amounts must be grounded elsewhere, such as in the provision of adequate protection** * * *.

3 COLLIER ON BANKRUPTCY ¶ 506.05, at 506-44 (15th ed. L. King 1995) (italics in original; boldface emphasis added; footnotes omitted). By observing that "adequate protection" under Section 361 can be a source of entitlement to *current* payment of interest (to which Section 506 creates a basic *substantive* entitlement), the Collier treatise flatly contradicts the Eleventh Circuit's sweeping holding that, as a matter of law, "adequate protection" *never* includes current interest payments.[3]

---

[3] In its discussion of Section 361, the Collier treatise also makes clear the Eleventh Circuit's error. For one thing, addressing a fact pattern somewhat different from this case (real estate rents) but nevertheless inconsistently with the Eleventh Circuit's sweeping theory, the treatise observes that "adequate protection, at least for an interim period, may consist of a requirement that some portion or all of the rents be applied in a certain manner, perhaps * * * to pay interest." 2 COLLIER, *supra*, ¶ 361.01[1], at 361-7. In addition, in discussing *Timbers*, the Collier treatise correctly understands this Court's rationale to have been "grounded upon the view that to require the payment of interest to the

The propriety of "adequate protection" payments of postpetition interest to oversecured creditors was, until the decision below, settled in the lower federal courts – so much so that it is difficult even to find precedents discussing the propriety of this seldom-questioned practice. Nevertheless, there are reported decisions in which courts have explicitly and advertently provided for postpetition interest payments as part of "adequate protection." *E.g.*, *In re East-West Associates*, 106 B.R. 767, 773 (S.D.N.Y. 1989) (citing *Timbers*). See also American Council of Life Insurance Amicus Brief (collecting cases).[4]

The sea change that the decision below threatens to bring about would have wide-reaching and deleterious effects – ironically, not just for creditors denied interest during the often-lengthy pendency of a bankruptcy case, but also for debtors. Drawing on their own experience, amici will devote the remainder of this brief to explaining the practical con-

---

holders of *undersecured* claims would be inconsistent with the wording and purpose of sections 506(b), 552(b), and 362(d)(2) and, in light of that fact, interest may not be paid on undersecured claims in the absence of express statutory authority." *Id.* ¶ 361.01[2], at 361-11 to 361-12 (emphasis added). The treatise likewise recognizes, *id.* at 361-12, that this Court in *Timbers* did not "adopt the language of the court below," whereas the Eleventh Circuit here quoted interchangeably from this Court's opinion and the opinion of the court of appeals in *Timbers*, as if they were equally authoritative. See Pet. App. A13-A14, A15-A16.

[4] In 1984, Congress passed wide-ranging amendments to the Bankruptcy Code, including revisions of Sections 362 and 506(b). See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 441, 448, 98 Stat. 333, 371, 374. Congress made no effort to change the practice, by then routine, of protecting oversecured creditors' interest entitlement during the pendency of a bankruptcy case. That fact strongly suggests that the Code should not now be interpreted to invalidate that practice. See *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975).

sequences of the holding below and its inconsistency with important bankruptcy policies.

An illustrative example using hypothetical numbers may help to focus the discussion. Under "floor plan financing" (which was explained in the attached motion for leave to file this amicus brief), a typical car dealer might at any given time have 200 vehicles on the lot, with an average cost to the dealer of $15,000 and average retail price of $18,000. The total cost of the inventory would be $3 million. If those vehicles were financed by GMAC, Ford Credit, or Chrysler Credit at an interest rate of 8%, the dealer's monthly interest payment (or "floor plan charge") would be 1/12th of $240,000, or $20,000. The dealer, outside of bankruptcy, therefore would pay to the credit company each month that amount, plus the principal of the loans on cars as they were actually sold. The dealer would not pay any amortization of principal.

At the moment of bankruptcy, however, everything changes – if the decision below is correct. The dealer could be required as part of "adequate protection" to continue repaying the principal of the loan on each vehicle as it was sold, but the monthly interest payments would cease altogether. The dealer would be in arrears to the lender by $20,000 after just one month (in addition to any prior arrearages, which might be substantial in a bankruptcy situation), and the arrearage would grow each month. Facing ever-increasing amounts that cannot be collected until the end of a bankruptcy case, potentially many months in the future, lenders will be forced to seek adversarial actions against the dealer – such as lifting of the automatic stay or complete conversion of the bankruptcy case from a reorganization to a liquidation.[5] A debtor will then have a very difficult time obtain-

---

[5] See generally *Timbers*, 484 U.S. at 375-376 (encouraging quick relief from stay when there is no good prospect of successful reorganization).

ing the financing necessary to allow it to continue to replenish its inventory as cars are sold.[6] Yet inventory turnover, of course, is the key to success in any retail business. As a result, the business would dwindle, any possible going-concern value would be lost, and little or no money would remain to salvage the business or to pay unsecured creditors.

The situation is different if the lender is assured adequate protection of its "floor plan charges" in addition to repayments of principal. The lender may – and, in amici's experience, often does – find it advantageous to continue something resembling "business as usual" with the debtor, providing financing on a continuous basis for the necessarily rapid turnover of inventory. Doing so may preserve the going-concern value of the dealership, may help the dealer to overcome temporary cash-flow problems that may have given rise to the need for bankruptcy protection (rather than a fundamental long-term inability to run a profitable business), and

---

Under 11 U.S.C. § 1129(a)(7)(A)(ii), a plan of reorganization, to be confirmed, generally must provide creditors with at least as much value as they would get in a Chapter 7 liquidation. Creditors who receive no "adequate protection" at all for their interest entitlement during the course of the bankruptcy proceeding will rarely have much prospect of actually receiving full value in a reorganization, since by the time of plan confirmation the money that would otherwise be used to pay the interest due under Section 506(b) will have been put to other uses. So the prospects of successful reorganization will rarely be great if the decision below accurately states the law.

[6] Although the debtor might *agree* with a lender to pay interest on prepetition loans in order to obtain the lender's agreement to provide postpetition financing, other creditors or the bankruptcy trustee might, if the decision below correctly holds that the lender otherwise *cannot* obtain such payments as part of its adequate protection, object to such an agreement on the ground that it will deplete the estate and risk leaving less money for ultimate payment of other debt and the costs of administration of the estate. The decision below thus places a major obstacle in the path of even voluntary agreements to pay interest on a current basis.

ultimately will help the dealer to reorganize. These worthy goals are often pursued through cash collateral orders (see 11 U.S.C. § 363) in dealer bankruptcies. But no lender is likely to lend money to a bankrupt dealer if, by doing so, it cannot collect interest on loans as it is earned. This simply would not be a prudent lending decision. The Eleventh Circuit's decision thus would drastically decrease the prospects of successful reorganization by durable goods retailers.[7]

The decision also would force lenders to demand greater collateral for their loans. At present, a loan on a car or other durable good is typically secured only by the car (or other good) itself. Because interest is paid on a monthly basis, the car (which can be sold for more than the loan principal) is sufficient collateral for the part of the loan that is at some risk. If, however, monthly interest payments cease on bankruptcy – as the Eleventh Circuit's decision contemplates – the lender would watch its collateral quickly disappear: the dealer in bankruptcy would sell the very cars that secured the loans, but would *not* use the excess cash generated by the sales to pay interest[8] (or even save the excess cash for purposes of eventually paying interest, since the Eleventh Circuit has held that the lender's right to interest need receive no "adequate protection" at all). The only rational thing for a lender to do, if faced with collateral that would disappear in bankruptcy and with no other collateral to ensure that there will eventually be funds for the dealer to pay the interest liability, is take a security interest in items other than the vehicles themselves, such as parts, signs, accounts receiv-

---

[7] See *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

[8] Under Sections 9-203(3), 9-306, and 9-312(3) of the Uniform Commercial Code, the lender would – outside of the bankruptcy context – have a security interest in *all* the proceeds of the sale, not just the amount necessary to repay the principal.

able, or the franchise itself. If, however, *those* assets become encumbered by security interests of the floor plan lender, the dealer will have fewer assets available to pledge as security for working capital or other credit it may need. The ability of financially weak dealers to run a business at all, thus, will suffer as a consequence of the decision below.[9]

The decision below also threatens to raise the cost of borrowing. In a very significant number of bankruptcies, if the decision below stands and is followed, the debtor will never fully pay the interest it owes to the lender, because that interest has not been – and need not be, according to the Eleventh Circuit – adequately protected during the pendency of the bankruptcy case. At the end of the case (an end probably hastened by the debtor's inability to secure new financing), there often will not be enough money available to pay all of the accrued interest liability. To account for that fact, lenders will simply have to raise the cost of capital to *all* of the dealers to whom they lend (since they will not know in advance which of them will end up in bankruptcy).[10]

Making successful reorganization more difficult, forcing lenders to demand greater collateral, and raising the cost of

---

[9] See Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 791 (1987) ("[S]ecured purchase money lender * * * transactions facilitate continued operation of a tottering business, and they are essential if the business is to have a chance to avoid bankruptcy."); *id.* at 791 n.31 ("Secured credit may also be essential to weak businesses and, accordingly, the effects of bankruptcy laws on the role secured credit plays in nonbankruptcy transactions is another important distributional concern. * * * [T]o the extent that security interests do not give unfettered collection rights in bankruptcy, secured creditors are discouraged from relying solely on their security interests for complete protection.").

[10] See *In re Patterson*, 825 F.2d 1140, 1142 (7th Cir. 1987) (Posner, J.) (pointing out that construction of the Code to favor a debtor in a particular case may "hurt the very class sought to be benefited," by "mak[ing] lenders even more reluctant to lend money" on affordable terms).

capital are all undesirable consequences of the decision below, and are results completely contrary to basic bankruptcy policy. The vast majority of all debtors will not benefit, but will suffer, from the decision below. Secured creditors will suffer along with them, as their ability to recover interest is placed in jeopardy and they are forced by circumstance to seek termination of the automatic stay or conversion of the bankruptcy case to a liquidation, even when they would benefit more by working together with the debtor. And unsecured creditors will suffer too, as secured creditors are forced to respond to the decision below by taking greater collateral, leaving fewer unencumbered assets from which unsecured creditors might be paid.

It is a notorious fact, moreover, that most efforts to reorganize under Chapter 11 are *not* successful, and that most cases are converted to liquidations. If there is no obligation to provide adequate protection for an oversecured creditor's Section 506(b) interest entitlement, then the estate by the time of liquidation will rarely have sufficient available assets to pay the accrued interest. The result of the decision below, then, is that the *undisputed* intent of Section 506(b) – to allow oversecured creditors to receive interest out of the "equity cushion" – will often not be fulfilled.

These consequences need not occur. The Eleventh Circuit's serious misunderstanding of *Timbers* and of the Bankruptcy Code can be corrected by this Court *before* it sows confusion in the bankruptcy and district courts.[11]

---

[11] This Court does not always await a conflict in the circuits before granting certiorari to resolve issues of bankruptcy law with great practical importance. In *Pennsylvania Department of Public Welfare* v. *Davenport*, 495 U.S. 552, 557 (1990), the Court explicitly granted certiorari "[t]o address a conflict among Bankruptcy Courts." In any event, as petitioner points out, the decision below is inconsistent with *New York Life Insurance Co.* v. *Revco D.S., Inc.*, 901 F.2d 1359, 1365 (6th Cir. 1990).

"The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco*, 465 U.S. at 528. The decision below will not assist but will hinder that fundamental purpose by making much more difficult the reorganization of companies that sell durable goods. This Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0657

Counsel for Amici Curiae

OCTOBER 1995